INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Conclusion	10

CITATIONS

Cases:

Nardone v. *United States*, 302 U. S. 379	4, 6, 7
Nardone v. *United States*, 308 U. S. 338	4, 6, 7
United States v. *Yee Ping Jong*, 26 F. Supp. 69	5, 9
Weiss v. *United States*, 308 U. S. 321	4, 6, 7

Statute:

Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U. S. C., Sec. 605)	2

248026—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE POLAKOFF AND WILLIAM ALBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on June 26, 1940, reversing the convictions of the respondents in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the court below (R. 300–308) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1940 (R. 308). The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the recording of a telephone conversation, with the authorization of one party thereto, on a recording apparatus attached to an extension line, constitutes a violation of Section 605 of the Federal Communications Act.

STATUTE INVOLVED

Section 605 of the Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U. S. C., Sec. 605) provides in part as follows:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

STATEMENT

Respondents were indicted for conspiracy to obstruct justice by attempting to influence an Assistant United States Attorney in his recommendation of sentence to the district judge in the case of one Sidney Kafton (R. 4–6). Respondents were found guilty by the jury (R. 266) and each was sentenced to two years' imprisonment (R. 6–7).

Kafton had been indicted for narcotic offenses (R. 19). Respondent Albert proposed to Kafton

that if he would plead guilty and pay a sum of money, Albert would have a "certain party" induce the Assistant United States Attorney in charge of Kafton's case to recommend to the district judge that a light sentence be imposed (R. 24–25). Kafton immediately reported the incident to agents of the Narcotic Bureau (R. 25, 195), who instructed him to continue negotiations in order to ascertain how far Albert would go (R. 67). Albert's contact with the Assistant United States Attorney was through respondent Polakoff; as the record discloses, Polakoff took active steps in an endeavor to have the Assistant United States Attorney recommend a short term of imprisonment for Kafton (see, e. g., R. 78 *et seq.*, 161–162, 164 *et seq.*).

Kafton told agents of the Federal Bureau of Investigation, to whom he had been sent by agents of the Narcotic Bureau, what had occurred (R. 27, 100). Through a telephone in the offices of the F. B. I., Kafton had a talk with each of the respondents, which was recorded upon a machine attached to an extension in the same circuit as the telephone which Kafton used (R. 103, 203–204, 212–216). The recording of the conversations was done by F. B. I. agents with the knowledge and permission of Kafton (R. 203–204, 212–214). Each of the respondents made damaging declarations in his talk with Kafton which implied the existence of an unlawul conspiracy to obstruct justice (R. 213–214, 216–218).

At respondents' trial, Kafton, as part of the Government's direct case, testified about his telephonic conversations with respondents (R. 27–28, 30–31). During the course of defendants case, Albert, on cross-examination, denied that he had ever spoken to Kafton on the telephone (R. 148–149). Respondent Polakoff admitted talking with Kafton, but his version of the conversation differed substantially from the version previously given by Kafton (R. 30–31, 170–171). Under these circumstances, as part of its rebuttal, the Government offered in evidence the recordings made during the two telephone calls (Exs. 5, 6, R. 213–216).

On appeal to the court below, respondents' convictions were reversed on the sole ground that the recordings were improperly admitted in evidence (R. 303, 309). The majority opinion of the court was delivered by Judge Learned Hand (R. 300); a sharp dissenting opinion was delivered by Judge Clark (R. 304); and a concurring opinion was delivered by Judge A. N. Hand (R. 303). In the concurring opinion, Judge A. N. Hand stated that he would be "gratified" if the Supreme Court would adopt the views expressed by Judge Clark in his dissenting opinion, but that he felt constrained to concur in the opinion of Judge Learned Hand because of the decisions in *Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321; and *Nardone* v. *United States,* 308 U. S. 338.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the recording of a telephone conversation with the authorization of one party thereto, on a recording apparatus attached to an extension line, is an "interception" within the meaning of Section 605 of the Federal Communications Act.

2. In holding that under Section 605 of the Federal Communications Act one party to a telephone conversation, without the consent of the other, cannot validly authorize a Government agent to overhear, record, and divulge such conversation.

3. In holding as a matter of law that a person who, with the consent of one party to a telephone conversation, listens to such conversation, cannot testify to the substance of the conversation over the objection of the other party to the conversation.

4. In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

The question decided by the court below is one of first impression in the Circuit Courts of Appeals.[1] Although there is, therefore, no conflict of decisions, the issue is of such obvious importance in the administration of the federal criminal laws as

[1] The question was, however, raised in the case of *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W. D. Pa.), and decided directly contrary to the decision below.

to call for review by this Court.[2] The desirability of review in the present case, without awaiting a possible future conflict, is emphasized by the fact that the decision below will presumably control the activities of the Federal Bureau of Investigation, not only in the territory covered by the Second Circuit but throughout the country, unless and until the decision is reversed or disapproved by this Court.

It is clear from the opinions in the court below that respondents' convictions were reversed only because the majority of the court felt that the case fell within the principles announced by this Court in the two *Nardone* cases (*Nardone* v. *United States,* 302 U. S. 379; *id.,* 308 U. S. 338) and in *Weiss* v. *United States,* 308 U. S. 321. Judge A. N. Hand made this clear in his concurring opinion (R. 303):

> I concur in the opinion of Judge Learned Hand in the above case and also with the opinion (*Per Curiam*) in *United States* v. *Fallon,* because the results reached seem to follow inevitably from the recent decisions of the Supreme Court which have construed the Federal Communications Act as pre-

[2] The issue is also of importance in civil cases since, as we point out below, it would prevent a party to a civil suit from offering in evidence in support of his testimony as to the substance of a telephone conversation either the testimony of, or a transcription of the conversation made by, a secretary listening at an extension phone without the knowledge of the other party to the conversation.

venting the use of telephonic messages obtained through interception, without the consent of the sender, as evidence in criminal prosecutions.

It may be that the views expressed by Judge Clark in his dissenting opinion will prevail and I should be gratified if the Supreme Court would go even so far. But it is difficult for me to see how such a line can be drawn in view of the reasons given for the decisions in *Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321; and *Nardone* v. *United States,* 308 U. S. 338.

In our view, the decision below in the present case was in no way compelled or authorized by the *Nardone and Weiss* decisions, but to the contrary constitutes an unwarranted and unreasonable extension of the principle of those cases.

Construction of Section 605 of the Communications Act to prohibit what is commonly known as wire-tapping was based, as this Court stated in the second *Nardone* case, not upon a "meticulous reading of technical language" but upon "broad considerations of morality and public well-being" (308 U. S. 338, 340). The Court was of opinion that the use of wire-tapping was "inconsistent with ethical standards and destructive of personal liberty" (*id.*) and that proof obtained by this method was consequently incompetent. The participants to telephonic conversations were deemed to have a right of privacy which public policy re-

quired should remain inviolate against unauthorized intrusions by third persons, whether government agents or others.

No similar policy applies to the present case, since there was here no wire-tapping and no unauthorized invasion of the right of privacy. Each participant to a telephonic communication is at liberty to divulge to anyone he pleases what was said; consequently, the act of disclosure by a participant, in whatever form it may occur, cannot be deemed to be a violation of any right of privacy enjoyed by the other participant. As Judge Clark stated in his dissent, "Reasons of policy justify the making of telephonic communications privileged for the two parties involved; they do not justify making them so privileged to one party as against use by the other" (R. 304). In the present case, for example, Kafton clearly had the right to tell anyone what he had heard respondent say; he clearly had the right to write down the conversation as it occurred and show the written transcription to anyone; and he clearly had the right to connect the actual telephone which he used to a loud speaker and have the conversation heard by others or taken down by a stenographer. There is, we submit, no possible difference, from either an ethical or legal standpoint, between publication of the talk in this manner by the participant himself and publication of it through the playing of a recording made, with the permission of the participant, on an apparatus attached to an extension

phone. Once it is established, as it is here, that disclosure of the substance of the communication is permissible, no moral considerations dictate that the disclosure must be through reliance upon a fallible human memory rather than through reliance upon a mechanical recording.

Certainly the words of Section 605 do not require the conclusion that the recording was a violation of the statute. In the first place, where a communication reaches the person for whom it is intended, it is hard to see how it is "intercepted" when that person directs or permits it to be transcribed. As the court held in *United States* v. *Yee Ping Jong,* 26 F. Supp. 69 (W. D. Pa.), a decision directly contrary to that below, the verb "intercept" means to take or seize before arrival at the destined place; since a recording on an extension phone is made at the destination of the communication and not before it is reached, it can scarcely be deemed an interception within this definition.

Moreover, only such interceptions are forbidden as are not authorized by the "sender." The word "sender" does not literally apply to telephone communications; consequently, its meaning as so applied must depend largely upon the policy sought to be effectuated. Since, as we have shown, there is no policy against the transcription of a telephonic talk with the permission of either participant thereto, the word "sender" as used in Section 605 should, we believe, be interpreted to mean either party to a telephonic communication. So

construed, the recording here involved was plainly beyond the prohibition of the statute.

The contrary decision reached by the court below is sweeping in its implications. As suggested by Judge Clark in his dissent, the rationale of the majority opinion would logically prevent either party to a conversation, without the consent of the other party, from having his secretary listen to a talk on an extension phone and transcribe it (R. 305–306). A decision imposing so far-reaching a restriction with respect to a device in such common and extensive use as the telephone plainly calls, we believe, for review by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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